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EXAMINER

BECKER, D

ART UNIT	PAPER NUMBER
1761	13

DATE MAILED:

10/11/00

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Office Action Summary	Application No. 09/121,725	Applicant(s) Voisin
	Examiner Drew Becker	Group Art Unit 1761

Responsive to communication(s) filed on Sep 25, 2000

This action is **FINAL**.

Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire 3 month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

Disposition of Claims

Claim(s) 3, 4, 6, and 7 is/are pending in the application.

Of the above, claim(s) _____ is/are withdrawn from consideration.

Claim(s) _____ is/are allowed.

Claim(s) 3, 4, 6, and 7 is/are rejected.

Claim(s) _____ is/are objected to.

Claims _____ are subject to restriction or election requirement.

Application Papers

See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

The drawing(s) filed on _____ is/are objected to by the Examiner.

The proposed drawing correction, filed on _____ is approved disapproved.

The specification is objected to by the Examiner.

The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

All Some* None of the CERTIFIED copies of the priority documents have been

received.

received in Application No. (Series Code/Serial Number) _____.

received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

*Certified copies not received: _____.

Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

Notice of References Cited, PTO-892

Information Disclosure Statement(s), PTO-1449, Paper No(s). 9-10

Interview Summary, PTO-413

Notice of Draftsperson's Patent Drawing Review, PTO-948

Notice of Informal Patent Application, PTO-152

--- SEE OFFICE ACTION ON THE FOLLOWING PAGES ---

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DETAILED ACTION

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 6-7 are rejected under 35 U.S.C. 102(b) as being anticipated by JP 4356156A.

JP 4356156A teach a method of treating shellfish comprising exposing raw oysters (paragraph 0005) contained in plastic bags filled with sea-water (paragraph 0010) to hydrostatic pressures of 14,615-44,087 psi for 0.5-10 minutes at ambient temperatures (paragraph 0006).

Although JP 4356156A do not recite any effect upon pathogenic *Vibriones* bacteria, the method steps utilized in the reference are the same as those instantly claimed, and thus one of ordinary skill in the art would have expected the same results. The claimed characteristic of eliminating pathogenic *Vibriones* bacteria is considered an inherent property and result of the referenced method, and not unique to the instant invention, absent any clear and convincing evidence or arguments to the contrary. Further, it was known that high pressure treatment of seafood destroyed pathogenic organisms such *Vibrio*, as evidenced by Cheftel [Effects of high hydrostatic pressure on food constituents: an overview] (page 204, heading 1.2).

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Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 3-4 are rejected under 35 U.S.C. 103(a) as being unpatentable over JP 4356156A.

JP 4356156A teach a method of treating shellfish by providing a pressure vessel (paragraph 0010) and exposing raw oysters (paragraph 0005) contained in plastic bags filled with sea-water (paragraph 0010) to hydrostatic pressures of 14,615-44,087 psi for 0.5-10 minutes at ambient temperatures (paragraph 0006). Although JP 4356156A do not recite any effect upon pathogenic Vibrios bacteria, the method steps utilized in the reference are the same as those instantly claimed, and thus one of ordinary skill in the art would have expected the same results. The claimed characteristic of eliminating pathogenic Vibrios bacteria is considered an inherent property and result of the referenced method, and not unique to the instant invention, absent any clear and convincing evidence or arguments to the contrary. Although not specifically recited, it would have been obvious to one of ordinary skill in the art to refrigerate the pressure treated oysters of JP 4356156A since cooling to refrigeration temperatures is a commonly used method of preserving raw food products.

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Response to Arguments

5. Applicant's arguments filed September 25, 2000 have been fully considered but they are not persuasive.

Applicant argues against the inherent microbiological effects of the method of JP 4356156A. Although JP 4356156A do not recite any effect upon pathogenic Vibriones bacteria, the method steps utilized in the reference are the same as those instantly claimed, and thus one of ordinary skill in the art would have expected the same results. The claimed characteristic of eliminating pathogenic Vibriones bacteria is considered an inherent property and result of the referenced method, and not unique to the instant invention, absent any clear and convincing evidence or arguments to the contrary. Further, it was known that high pressure treatment of seafood destroyed pathogenic microorganisms such as Vibrio, as evidenced by Cheftel (page 204, heading 1.2).

Applicant argues that JP 4356156A was initially disclosed by European Patent Office (EPO) as being an "A" reference (defining general state of the art) and therefore was not considered applicable prior art. Applicant is reminded that the authorized officer at the EPO only had access to the abstract of this patent which lists an incorrect pressure range than that which was used in the actual method. Regardless, that correspondence from the EPO was only a Search Report and as such, did not apply the references to the applicant's claims.

Applicant also filed two letters with this response written by Robert L. Collette and Michael W. Moody. These letters have been considered but are not deemed to be sufficient

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evidence to remove the present rejections. The letters of Mr. Collette and Mr. Moody merely disclose that they *personally* are not aware of this method being done. This is countered by applicant's filing of an IDS on July 24, 2000 which discloses that it was known that high pressure treatment of seafood destroyed pathogenic microorganisms such as Vibrio, as evidenced by Cheftel (page 204, heading 1.2).

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Applicant argues that since this application was subject to a restriction requirement prior to initial examination, that the two methods are unrelated. While the two methods in question (shucking of shellfish using high pressure and pasteurization of shellfish using high pressure), were not examined in the same application, this does not constitute a judgement on patentability between the instant claims and JP 4356156A. The restriction in question was based on the methods having different effects in addition to different pressure ranges the use of a flexible band. Regardless, the restriction was based solely on the applicant's claims and has nothing to do with the present rejection in relation to JP 4356156A. As mentioned above, the method steps utilized

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in JP 4356156A are the same as those instantly claimed, and thus one of ordinary skill in the art would have expected the same results. Particularly in view of the teachings of Cheftel.

Conclusion

6. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew Becker whose telephone number is (703)-305-0300. The examiner can normally be reached on Monday-Thursday from 7:00 am to 5:00 pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gabrielle Brouillette, can be reached on (703)-308-0756. The fax number for this Group is (703)-305-3602.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-0661.

Drew Becker

October 5, 2000

G. Brouillette
GABRIELLE BROUILLETTE
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700

10/6/00